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JUN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
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Ms. Donna R. Searcy
Secretary - Stop Code 1170
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Washington, D.C. 20554

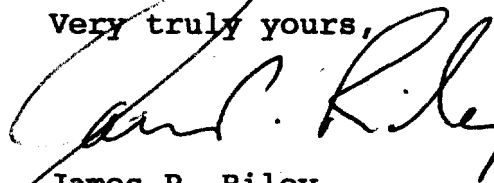
Re: MM Docket 93-155

Dear Ms. Searcy:

Transmitted herewith on behalf of Richard P. Bott, II are an original and fourteen copies of his "PETITION FOR LEAVE TO FILE PETITION FOR RECONSIDERATION" and "PETITION FOR RECONSIDERATION."

Should any questions arise concerning this matter, kindly communicate directly with the undersigned.

Very truly yours,



James P. Riley
Counsel for Richard P. Bott, II

JPR/rhw
Enclosure

cc: Mr. Richard P. Bott, II (with enclosures)

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BEFORE THE

RECEIVED

Federal Communications Commission

JUN 20

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)

RICHARD BOTT II)
(Assignor))

and)

WESTERN COMMUNICATIONS, INC.)
(Assignee))For Assignment of Construction)
Permit of Station KCVI(FM),)
Blackfoot, Idaho)

File No. BAPH-920917GO

TO: The Commission

PETITION FOR LEAVE TO FILE PETITION FOR RECONSIDERATION

Richard P. Bott, II, permittee of Station KCVI(FM), Blackfoot, Idaho, and applicant in the above-captioned proceeding, through his counsel and pursuant to Section 1.3 of the Commission's Rules, hereby respectfully requests waiver of Section 1.106 of the Rules and leave to file the attached Petition for Reconsideration ("Petition") of the Commission's Hearing Designation Order, FCC 92-290, released, as corrected, June 15, 1993 ("HDO").¹ In support the following is respectfully submitted.

1. Section 1.106(a) of the Commission's Rules provides for reconsideration of an order designating a case for hearing "if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." Bott's Petition relates to Bott's participation in the hearing only to

¹ As originally issued, the HDO did not list the issues to be determined at the hearing in this proceeding.

the extent that the Commission's factual premise for designating issues against Bott concerning his application for assignment of the construction permit of KCVI(FM), Blackfoot, Idaho to Western Communications, Inc. is demonstrably in error. Bott's Petition is technically beyond the scope of § 1.106(a)(1). Bott therefore requests that the Commission waive § 1.106(a)(1) and reconsider the HDO in the above-captioned proceeding.

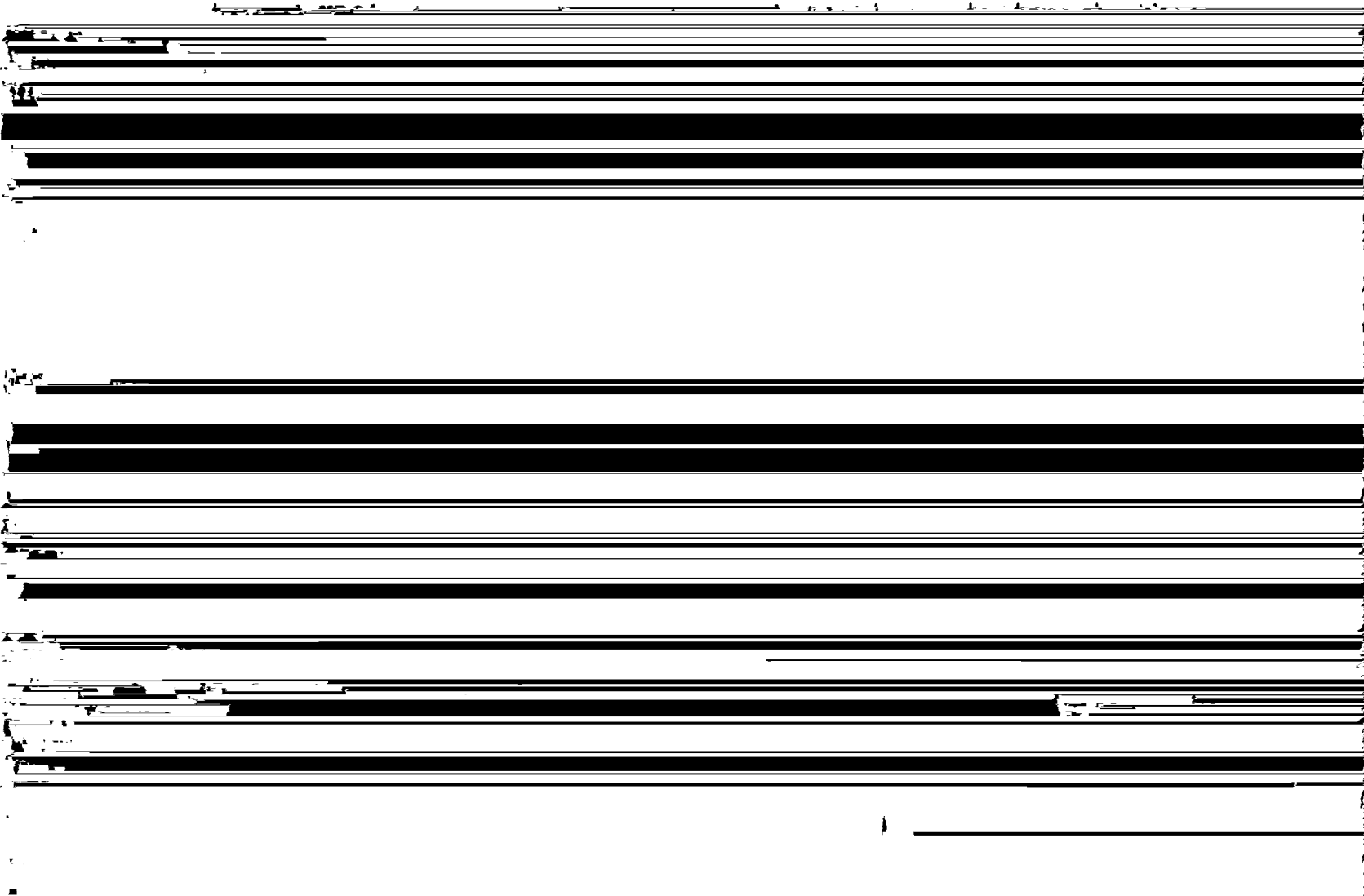
2. As shown in the attached Petition, the Commission substantively misstated a key fact from a pleading filed on behalf of Bott in this assignment proceeding. This misstatement, in turn, provides the stated basis for the designation of issues against Bott in the HDO. Unlike prior Commission precedent,² waiver of § 1.106(a)(1) in order to correct the Commission's erroneous premise is justified.

3. In Royal Broadcasting Company, Inc., a request to delete an issue - treated as a request for reconsideration of the HDO - was found to be unjustified because the petitioner had neither presented new or changed facts not known by the Commission at the time of the designation nor claimed that the Commission's premise in adding the issue was incorrect or based upon incomplete facts. In the attached Petition, Bott establishes that the factual basis for the designation of issues against Bott was incorrect.

² See, e.g., Orange Nine, Inc., 10 R.R.2d 1090 (1971), where the Commission denied a petition for reconsideration of an HDO on the basis that inadequate justification for the waiver of § 1.106 had been shown. See also, Royal Broadcasting Company, Inc., 8 R.R.2d 637 (Rev. Bd. 1966).

4. Furthermore, although the Commission has consistently found that reconsideration of an HDO on a basis other than that expressly provided for in § 1.106(a) of the rules is impermissible under its policy and rules against appeal of an interlocutory matter or because it ignores the summary decision procedure expressly adopted to expedite the hearing process, in at least one instance it has granted reconsideration of an HDO to add language to correct the HDO. See, Peoria Community Broadcasters, Inc., 48 R.R.2d 1164 (1981).³

5. Moreover, the Commission, with relative frequency, has



6. Reconsideration of the HDO in this proceeding is warranted in the public interest to prevent the wasteful expenditure of the Commission's limited resources on hearing issues designated on the basis of an erroneous premise, and to provide the most elemental fairness to an applicant. When it can be demonstrated that the basic fact relied upon by the Commission was misstated, the applicant before the Commission deserves a correction before the process moves forward.

WHEREFORE, in light of the foregoing, Richard P. Bott, II respectfully requests that the Commission waive Section 1.106(a) (1) of its rules and accept and consider the attached Petition for Reconsideration of the Hearing Designation Order in the above-captioned proceeding.

Respectfully submitted,

RICHARD P. BOTT, II

By 

James P. Riley
Kathleen Victory
His Attorneys

FLETCHER, HEALD & HILDRETH
1300 North 17th Street
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June 25, 1993

⁴(...continued)

basis for the Commission's denial of several petitions for reconsideration filed by parties whose applications had been returned by the processing staff. Similarly, in Mexican-American Communications Entertainment Group, DA

HDO:

In par. 3 the Commission found that in responding to the petition to deny in this assignment proceeding, Bott stated that "throughout the six-year effort to obtain his permit he maintained..." an intention to "operate KCVI as a commercial facility with a religious format."

In par. 9 the Commission quotes Bott's testimony from the comparative hearing record after stating that the "hearing record does not reveal any qualification to Bott's pledges, such as being contingent on the practicality of introducing a commercial religious or any other particular format." The quoted testimony of Bott at pp. 61 and 95 of the hearing transcript shows that Bott testified during the comparative hearing that he had not made a format decision.

Finally, in par. 9 the Commission concluded: "However, as previously noted in Paragraph 3, supra, Bott has represented in the instant proceeding that, throughout the comparative proceeding, he always intended to operate with a commercial religious format and that KRSS's adoption of an identical format dramatically changed the local market situation."

3. In fact, the conflict between Bott's hearing testimony and his statements in the instant proceeding, relied upon by the Commission to designate Issue (a) -- the candor/misrepresentation issue -- does not exist. The only evidence of Bott's statements in the instant proceeding is contained in Bott's testimony at pp. 61 and 95 of the hearing transcript.

declaration filed with the Opposition to Petition to Deny ("Opposition") submitted on his behalf on November 10, 1992, attached hereto as Exhibit A. At p. 1 of that November declaration, Bott provided this clear statement of the sequence of events: "In April of 1990, the FCC finally granted the Blackfoot Application. In February, 1991 the FCC's award of the Blackfoot C.P. to me was affirmed by the Court of Appeals. I proceeded with more detailed planning for the station. I decided that I would operate the station with a religious format."

4. Bott has given a declaration, attached hereto as Exhibit B, in support of this petition. In his current declaration, Bott reaffirms his hearing testimony and his November declaration as to the timing of his format decision. As Bott states at p. 3 of his current declaration, "I did not decide upon a commercial religious format for my Blackfoot station until after the grant of my permit was certain, and I have not claimed otherwise in this assignment proceeding."

5. In his current declaration, Bott notes the presence of language in the Opposition pleading which "may have been misinterpreted by the Commission to mean that [his] format decision was made during the comparative proceeding..." Ex. B. p. 2. The

had hoped to implement." The pleading does not state or suggest that Bott's "decision to operate" was made or that his "hope to implement" arose prior to the grant of his application. In fact, read in conjunction with Mr. Bott's November declaration, attached to the Opposition, is it abundantly clear that Bott's format decision followed the 1991 Court of Appeals affirmation of his grant.

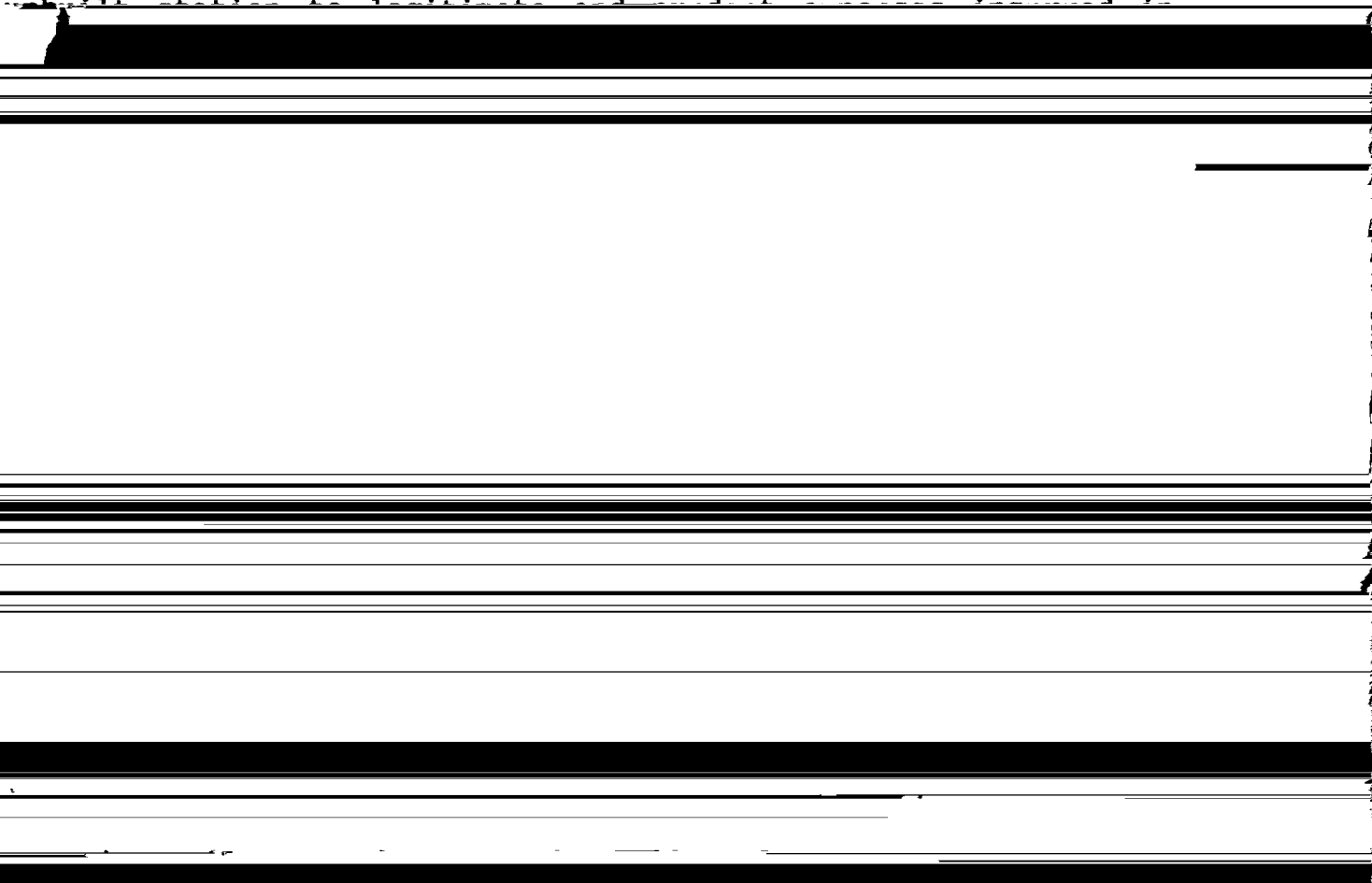
6. The HDO relied upon the Opposition pleading in finding a conflict between Bott's hearing testimony and his position in the instant proceeding. In par. 3 of the HDO the Commission stated: "[Bott] states that it was only 'several months' subsequent to the Court of Appeals...". The phrase "several months", quoted by the Commission, is found not in Bott's November, 1992 declaration but in the first full paragraph on p. 3 of the Opposition. However, nowhere in the Opposition, relied upon by the Commission, can there be found language supporting the HDO's assertion that, "throughout the six-year effort to obtain his permit...", Bott intended to operate "a commercial facility with a religious format." HDO, par. 3. As pointed out by Bott in his current declaration, Exhibit B, only a misinterpretation of language in the Opposition pleading could lead the Commission to conclude that Bott was representing that his format decision had been made during the pendency of his application.

7. Thus, the conflict between, on the one hand, Bott's representation in the instant proceeding as to when he made his format decision and, on the other hand, the hearing record does not

exist. Yet, as shown in par. 10 of the HDO, it is this nonexistent but supposed conflict that led to designation of Issue (a). In par. 10, the Commission stated that "[i]nsofar as Bott, by failing in any way to qualify his integration pledge [i.e., by failing to say that his integration "was contingent on the practicality of introducing a commercial religious or any other particular format", HDO, par. 9], led the Commission to grant his permit application, there arises a question as to whether he has misrepresented facts or lacked candor, either in his statements made during the course of the hearing, or in the instant assignment proceeding." (Emphasis supplied.) Therein lies the error.² What Bott has said in the instant proceeding is completely consistent with what he said in the course of the hearing. There is no conflict. Thus, the question does not arise as to whether there has been a misrepresentation or lack of candor. There is no basis for Issue (a) other than the Commission's erroneous reading of Bott's

(a). Issue (a)'s designation arises solely from the Commission's clearly erroneous reading of Bott's Opposition, as shown above. Deletion of the unfounded Issue (a) moots Issues (b) and (c), and warrants a grant of Bott's application. Deletion of Issue (a) and grant of Bott's application is the proper, legally compelled result in this proceeding under the law and precedent as it existed when Bott's assignment application was filed and as it exists today.

9. Bott's application for consent to assign the KCVI permit was filed September 17, 1992. Less than one month earlier, on August 19, 1992, the Commission released its unanimous Memorandum Opinion and Order in Eagle 22, Ltd., 7 FCC Rcd 5295 (1992), in which it stated: "The Assignment of Channel 22, an unbuilt station, is subject only to, and has met, the provisions of Section 73.3597 (c)-(d), which limit the consideration for the sale of an




awarded for integration of ownership with management control." Fort Collins Telecasters 103 F.C.C. 2d at 988. Eagle, having de minimis media interests and its competitor having no media interests, had been found equal to its comparative competitor with respect to the diversification criterion. Among the results of Eagle's sale of its unbuilt permit to group owner Chase Communications Corporation, approved by the Commission in August, 1992, is the elimination of Eagle's ownership integration; the joint ownership by Chase of channel 22 and KDVR(TV) in nearby Denver; Grade B contour overlap between channel 22 and KDVR; and operation of channel 22 by Chase as a satellite of KDVR. Eagle 22, Ltd., supra.⁴

11. Eagle was required to demonstrate, in support of its assignment application, why channel 22 could not be operated as a non-satellite television station as it had proposed in the comparative case, a requirement arising under the Commission's satellite station policy and not from the unbuilt status of the channel 22 permit. In Eagle, the Commission said: "While WGN [opposing Eagles' satellite policy showing] contends that these difficulties were not insurmountable, we do not require that an assignor exhaust all programming possibilities and we will not ~~engage in speculation as to which programming Eagle should have~~

contacted in order to proceed with its initial plans for a full-service station." Id. at 5297, n. 14.

12. If, in a proceeding where an explanation of an



earlier comparative hearing record showing misrepresentation or lack of candor by Bott.

14. The Commission has not amended Section 73.3597 since its August, 1992 Eagle ruling. As then, there is today no legal requirement that Bott provide a basis for his decision to assign the permit, only that he demonstrate he will not profit from the assignment. Bott elected to inform the Commission of his reasoning. In his November, 1992 declaration (Exhibit A at p. 3) Bott stated that, in 1992, he was approached with a potential offer to buy the permit.

"At first, I told him it wasn't for sale. But upon further reflection, I thought that with the change in the local competitive situation with the format I knew best, and with the poor overall state of the economy, a station with a duopoly operation and its inherent efficiencies and economies probably represents the best hope for a successful operation.

I consulted with my attorney and he told me that FCC law permitted me to sell my C.P. for the expenses I had into it at that point. I then decided that was the best thing to do, and contacted Mr. Frandsen to make arrangements to sell the C.P. to his company, Western Communications, for my expenses."

That statement gives the Commission no basis for a hearing on the assignment application, and no basis for denial of the application. As shown in Part I, nothing in the record supports designation of a misrepresentation/lack of candor issue. The absence of a basis for such an issue requires, pursuant to Eagle, the grant of the pending application.

CONCLUSION

Part I, supra, shows that only an erroneous reading by the Commission of a pleading submitted on Bott's behalf, in which there was no motive for Bott to deceive the Commission, supported the designation of Issue (a). Elemental fairness, as well as Commission precedent on sufficiency of a showing to support a misrepresentation issue, mandates the Commission revisit the designation of that issue and delete it. As further shown in Part II, the law is clear that upon the sale of an unbuilt permit the Commission requires only a showing of no profit, and nothing more. No claim has been raised that Bott is attempting to sell the CP for more than his expenses. If an assignor is qualified -- not guilty of misrepresentation or lack of candor -- and has demonstrated that he will not profit, the assignment should be granted.

WHEREFORE, the Commission should grant Bott reconsideration of the Hearing Designation Order herein, or should, in the interest of fairness and adherence to law, reconsider that Order sua sponte, to correct the sole factual premise for the addition of the issues against him, and should grant Bott's assignment application.

Respectfully submitted

RICHARD P. BOTT, II

By 

James P. Riley
Kathleen Victory
His Attorneys

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11th Floor, 1300 N. 17th Street
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(703) 812-0400
June 25, 1993

Richard P. Bott, II
Petition for Reconsideration

EXHIBIT A

November 9, 1992 Declaration
of Richard P. Bott, II

STATEMENT OF RICHARD P. BOTT, II

In 1985 I decided that it would be good for me to build my own radio stations and go into business for myself. In July, 1985 I filed an application for a new FM frequency in Central Valley, California and an application for a new FM frequency in Blackfoot, Idaho. I selected Blackfoot, Idaho after studying the market as a broadcast market, and studying the competitive situation in the area.

When both applications became designated for hearing at approximately the same time in the summer of 1987, I realized that I then needed to decide where I was going to live and make my home. It was then that I decided to move to Blackfoot and personally run that station.

In September 1987 I traveled to Blackfoot. I met with community leaders, and I looked at available homes and studio space that a real estate agent had picked out for me.

Over the next several years I was disappointed with how long it was taking for this application to go through the comparative hearing process, but it remained my intention and plan to build the station in Blackfoot, move there and personally run the station full time if and when I received the C.P. Throughout this time, I have rented an apartment in Kansas City rather than buy a house, in anticipation of moving to Blackfoot.

In April of 1990, the FCC finally granted the Blackfoot Application. In February, 1991 the FCC's award of the Blackfoot C.P. to me was affirmed by the Court of Appeals. I proceeded with more detailed planning for the station. I decided that I would operate the

station with a religious format. All of my previous years of radio experience had involved religious format stations.

As the overall economy had worsened, I knew I could still successfully operate the station and serve the community with a religious format. I had contacts with potential clients, and there was an opening in the market for that format.

On September 25, 1991, I learned that that opening had just closed. On that day I visited the office of Maranatha Advertising in Costa Mesa, California. Its main client is the Word For Today broadcast from Calvary Chapel Church. In a conversation I had with the media buyer, Teresa Rivera, I learned that the church had just purchased a new FM radio station in Pocatello, Idaho that would serve much the same market area I was proposing to serve with my proposed station from Blackfoot. She told me the church was going to increase the station's power and would use a format very similar to the one I was planning to use, featuring many of the same clients I was planning to sell time to.

Upon further investigation I learned that she was correct. The station, KRSS, which is actually licensed to Chubbuck, was acquired by the church in the fall of 1991, and is operated as a commercial religious station. I confirmed that KRSS was going to carry many of the same religious programs I had hoped to put on my station.

For me this dramatically changed the competitive situation in the market. The church had a tremendous head start. I knew it would be many months before I could get my station on the air. I also knew that the market was too small and the economy too "soft" to support 2 commercial religious stations. I felt I had lost a good market opportunity because of the nearly 6 year delay involved in the comparative hearing process.

Throughout the remainder of 1991 and into 1992, I proceeded with planning for construction of the station while I explored the options available to me.

In January 1992, I requested and received an updated site management plan from the BLM. On January 10, 1992 I requested, and later received new call letters from the FCC. I spoke to the president of the Users Group at the transmitter site. I consulted with my engineer and equipment supplier concerning technical aspects of the construction and the necessary equipment. I contacted Mr. Kent Frandsen to proceed with my plans to install my antenna on his tower. Over the course of several conversations, Mr. Frandsen suggested to me that, if anticipated changes in the FCC duopoly law were adopted, he would like to buy my C.P. At first, I told him it wasn't for sale. But upon further reflection, I thought that with the change in the local competitive situation with the format I knew best, and with the poor overall state of the economy, a station with a duopoly operation and its inherent efficiencies and economies probably represents the best hope for a successful operation.

I consulted with my attorney and he told me that FCC law permitted me to sell my C.P. for the expenses I had into it at that point. I then decided that was the best thing to do, and contacted Mr. Frandsen to make arrangements to sell the C.P. to his company, Western Communications, for my expenses.

I declare under penalty of perjury that the foregoing is true and correct.

11/9/92

Date

Robert P. Frandsen

Signature

Richard P. Bott, II
Petition for Reconsideration

EXHIBIT B

June 24, 1993 Declaration
of Richard P. Bott, II

DECLARATION

I, Richard P. Bott, II, hereby declare as follows:

I am the permittee of Station KCVI(FM), Blackfoot, Idaho, having been granted the permit following a comparative hearing.

An application I filed in September, 1992 to assign the KCVI permit has been designated for hearing. I have reviewed the Hearing Designation Order, and give this declaration to point out and correct a serious error in the Commission's statements of fact.

I did not make the determination to operate KCVI with a commercial religious format until after the grant of my permit had been affirmed by the U.S. Court of Appeals in February, 1991 and was no longer in contest. At the time my grant became certain I proceeded with more detailed planning for the station and decided, in the course of that planning, to broadcast a religious format.

My hearing testimony quoted in the Hearing Designation Order at par. 9 is correct and is entirely consistent with what I have just declared.

However, at para. 3 and 9 of the Hearing Designation Order the Commission claims that in a pleading in this matter (the opposition on my behalf to a petition to deny the assignment), I represented that throughout the comparative proceeding I always intended to operate my Blackfoot station with a commercial religious format. That is false. I have never made that representation, and it would not be true.

My declaration of November 9, 1992, filed in support of the opposition to the petition, makes my representation on this point: "In April of 1990, the FCC finally granted the Blackfoot

Application. In February, 1991 the FCC's award of the Blackfoot C.P. to me was affirmed by the Court of Appeals. I proceeded with more detailed planning for the station. I decided that I would operate the station with a religious format. All of my previous years of radio experience had involved religious format stations."

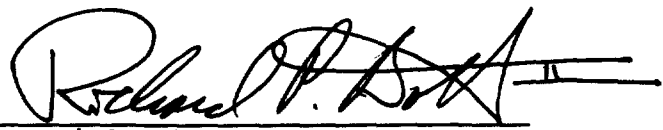
I have, since reading the Hearing Designation Order, reread the opposition to which my November 9, 1992 declaration is attached. At pp. 2-3, the opposition pleading says "circumstances arising only after the Court affirmed the grant made clear the window of opportunity had closed for establishment of the type of radio station Mr. Bott had decided to operate -- a commercial station with a religious format." While that language may have been misinterpreted by the Commission to mean that my format decision was made during the comparative proceeding, before the court's ruling, that is not so. As my declaration attached to that pleading makes clear, I decided to broadcast with a religious format only after the Court of Appeals 1991 decision. In the worsening economy I believed I could operate the station successfully if I chose to use that format. I had over the years developed contacts with persons in the religious broadcasting field -- persons who might be potential timebuying clients -- and I knew in 1991 that there was an opening in the market for that format at that time; that is, no other station in the market was broadcasting a commercial religious format. Then, after I had made my format decision I discovered, in September, 1991, that an FM station in the Pocatello, Idaho area had been purchased by a church and was

going to increase its power and coverage, and use a religious format very similar to the format I had decided upon. I nevertheless continued to move forward with development of the permit, but in 1992 decided to seek to assign it for my expenses.

To conclude, I did not decide upon a commercial religious format for my Blackfoot station until after the grant of my permit was certain, and I have not claimed otherwise in this assignment proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24th, 1993.


Richard P. Bott, II

CERTIFICATE OF SERVICE

I, Marnette Clemons, a secretary in the law offices of Fletcher, Heald & Hildreth, hereby certify that I have on this 25th day of June, 1993, had copies of the foregoing "PETITION FOR LEAVE TO FILE PETITION FOR RECONSIDERATION" and "PETITION FOR RECONSIDERATION" mailed by U.S. Mail first class, postage prepaid, to the following:

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Administrative Law Judge
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* denotes hand delivery.